Phuah Beng Chooi @ Koh Kim Kee & Anor (executor of the estate of Koh Hing @ Koh Heng Teik, deceased) v Koh Heng Jin

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S4–22–443 OF 2001
ASMABI MOHAMAD JC
29 JUNE 2012

Limitation — Administrative action — Accrual of cause of action — Claim for recovery of monies in bank account — Whether plaintiffs' claim time barred — Whether cause of action premised upon fraud or mistake or concealed by fraud — Whether there was postponement of limitation period until discovery of cause of action — Whether plaintiffs' pleaded case premised on fraud, mistake or concealment of fraud — Whether plaintiffs failed to commence case at earliest possible opportunity — Limitation Act 1953 ss 6(1) & 29

Koh Heng Teik ('the deceased'), his late father, Koh Hooi Chew ('KHC') and his brother ('the defendant') held a joint account with the Bangkok Bank Ltd in Singapore ('the bank account'). KHC died leaving a will wherein he named his late wife, the mother of both the deceased and the defendant, and his two sons ie the deceased and the defendant as the executors of his estate. A couple of months after KHC died, the deceased died and the defendant became the only surviving holder of the bank account. Some ten years later the defendant withdrew all the monies in the bank account, which amounted to S$346,505.09, and closed the account. The plaintiffs, who were the deceased's wife and her sister, became the administrators of the estate of the deceased. When the plaintiffs discovered that the defendant had withdrawn all the money in the bank account, they commenced an action against the defendant to recover the deceased's 1/3 share of the monies in the bank account, which they argued belonged to the deceased's estate. It was the plaintiffs' case that there had been an agreement between KHC, the deceased and the defendant that each account holder should be entitled to 1/3 of the monies in the bank account. The first plaintiff informed the court that being illiterate she had approached the defendant for his assistance in withdrawing the monies from the bank account. However, although the defendant had agreed to help the plaintiffs, it was later discovered that sometime in 1982 he had withdrawn all the monies in the bank account and kept the same all to himself. Consequently, the plaintiffs had commenced the present action. By way of this action the plaintiffs claimed the return of S$115,501.70, which was the deceased's one-third share of the monies in the bank account, interest and costs. In his defence the defendant contended that it was an agreement between the co-holders of the account that the surviving holder of the bank account was

entitled to all the monies in the bank account should the other two joint account holders predecease him. The defendant further claimed that he had decided to withdraw the monies from the bank account after he was notified by the Bangkok Bank Ltd in Singapore that the monies standing in the joint banking account could be withdrawn by him as he was the sole survivor of the account. According to the defendant he had informed both his late mother and the first plaintiff that he had withdrawn the monies in the account and closed the said bank account. The defendant also contended that the plaintiffs' claim was time barred and thus ought to be dismissed with costs. The plaintiffs proceeded to file an application under O 14A of the Rules of the High Court 1980 to enter judgment against the defendant. The plaintiffs' O 14A application relied entirely on the decision of the Court of Appeal in an earlier suit commenced by the administrators of the estate of the defendant's late mother against the defendant (the earlier suit). According to the plaintiffs the decision of the Court of Appeal in the earlier suit had conclusively determined the very question of law posed in the plaintiffs' O 14A application. In the earlier suit before the Court of Appeal, the court had ruled that as the defendant was an executor of the estate of KHC and therefore a trustee ss 22 and 29 of the Limitation Act 1953 ('the Act') could be invoked by the appellants in that suit to defeat the defence of limitation mounted by the defendant. After hearing the submissions of the parties in the O 14A application, the trial judge decided that there was only one issue to be ventilated by way of a full hearing and that was the issue of limitation. Both parties also agreed that the trial should proceed only for that limited purpose.

Held, dismissing the claim with costs:

(1) Section 6(1) of the Act provides that all causes of action founded on contract or tort or to recover any sum pursuant to a return law should not be brought after the expiration of six years from the date of the accrual of the cause of action. Notwithstanding s 6(1) of the Act, s 29 of the Act allows for postponement of the limitation period until the discovery of the cause of action in cases where the cause of action was premised upon fraud or a mistake or was concealed by fraud. However, as the plaintiffs' pleaded case was for the recovery of the 1/3 share of the monies in the bank account, they ought to have filed their case within six years from the date of the accrual of the cause of action, pursuant to s 6(1) and (6) of the Act. As the plaintiffs had not pleaded that their case was premised on fraud, a mistake or concealment of fraud they could not rely on the provisions of s 29 of the Act to demonstrate to the court that their right of action had been concealed by the fraud of the defendant. It is trite law that the plaintiffs were bound by their pleadings and ought not to be allowed to submit on matters not expressly provided in their pleadings (see paras 22 & 25).

(2) Based on the evidence adduced during the trial it was not disputed that

A the information pertaining to the monies in the bank account was well within the first plaintiff's knowledge from 1970. It was also clear that if the plaintiffs had been more diligent and vigilant they could with reasonable diligence have discovered about the withdrawal sooner and thus taken the necessary steps to commence the action to recover the 1/3 B share of the monies held in the bank account sooner. The plaintiffs' had failed in their basic and first duty to the estate of the deceased. By being diligent they had every opportunity to commence the case at the earliest possible opportunity, but they chose to delay the matter until limitation had set in (see para 23).

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(3) Finally, with the contrustive trust contention being negated by the agreed binding decision of the Court of Appeal case the plaintiffs were left with no defence to meet the plea of limitation mounted against them by the defendant. Thus, the plaintiffs' claim was barred by the Act (see paras D 28–29).

[Bahasa Malaysia summary

Koh Heng Teik ('si mati'), mendiang bapanya, Koh Hooi Chew ('KHC') dan saudara lelakinya ('defendan') telah memegang akaun bersama di Bangkok E Bank Ltd di Singapura ('akaun bank'). KHC meninggal dunia meninggalkan wasiat yang mana dia menamakan isterinya, ibu kepada kedua-dua si mati dan defendan, dan dua orang anak lelakinya iaitu si mati dan defendan sebagai wasi-wasi harta pusakanya. Beberapa bulan selepas KHC meninggal dunia, si mati telah meninggal dunia dan meninggalkan defendan seorang sahaja F sebagai pemegang akaun bank yang masih hidup. Kira-kira sepuluh tahun kemudian, defendan telah mengeluarkan kesemua wang dalam akaun bank tersebut, berjumlah S$346,505.09, dan menutup akaun. Plaintif-plaintif, isteri si mati dan saudara perempuannya, menjadi pentadbir-pentadbir harta pusaka si mati. Apabila plaintif-plaintif mendapati bahawa defendan telah G mengeluarkan kesemua wang dalam akaun bank, mereka memulakan tindakan terhadap defendan untuk mendapatkan 1/3 bahagian daripada wang milik si mati dalam akaun bank, yang dihujahkan adalah harta si mati. Adalah menjadi kes plaintif bahawa terdapat satu perjanjian antara KHC, si mati dan defendan bahawa setiap pemegang akaun hendaklah berhak mendapat 1/3 daripada H wang dalam akaun bank. Plaintif pertama memaklumkan mahkamah bahawa oleh kerana dia buta huruf, dia telah bertemu dengan defendan untuk mendapatkan bantuan bagi mengeluarkan wang daripada akaun bank. Walau bagaimanapun, walaupun defendan telah bersetuju untuk membantu plaintif-plaintif, sekitar tahun 1982, didapati bahawa defendan telah I mengeluarkan kesemua wang dalam akaun bank tersebut dan menyimpannya sendiri. Akibatnya, plaintif-plaintif telah memulakan tindakan ini. Dalam tindakan ini, plaintif-plaintif menuntut pemulangan S$115,501.70, yang merupakan 1/3 bahagian daripada wang si mati, beserta faedah dan kos. Dalam pembelaannya, defendan menghujahkan bahawa adalah menjadi satu

perjanjian antara pemegang-pemegang bersama akaun bahawa pemegang akaun yang masih hidup berhak ke atas kesemua wang dalam akaun bank jika kedua-dua pemegang akaun bersama yang lain meninggal dunia terlebih dahulu. Defendan juga mendakwa bahawa dia telah memutuskan untuk mengeluarkan kesemua wang daripada akaun bank selepas diberitahu oleh Bangkok Bank Ltd di Singapura bahawa wang dalam akaun bersama bank boleh dikeluarkan olehnya kerana dialah satu-satunya pemegang akaun yang masih hidup. Menurut defendan dia telah memaklumkan kepada mendiang ibunya dan plaintif pertama yang dia telah mengeluarkan wang dalam akaun dan menutup akaun bank tersebut. Defendan juga menghujahkan bahawa tuntutan plaintif telah terhalang oleh had masa dan dengan itu, seharusnya ditolak dengan kos. Plaintif meneruskan untuk memfailkan permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 untuk memasukkan penghakiman terhadap defendan. Permohonan A 14A plaintif-plaintif bergantung sepenuhnya kepada keputusan Mahkamah Rayuan dalam saman terdahulu yang dimulakan oleh pentadbir harta pusaka mendiang ibu defendan terhadap defendan ('saman terdahulu'). Menurut plaintif-plaintif, keputusan Mahkamah Rayuan dalam saman terdahulu telah, secara muktamad, menjawab persoalan undang-undang yang dikemukakan dalam permohonan A 14A plaintif. Dalam saman terdahulu di Mahkamah Rayuan, mahkamah telah memutuskan bahawa oleh kerana defendan adalah seorang wasi harta pusaka KHC dan dengan itu, seorang pemegang amanah, ss 22 dan 29 Akta Had Masa 1953 ('Akta') boleh diguna pakai oleh perayu-perayu dalam guaman tersebut untuk mengalahkan pembelaan had masa yang digunakan oleh defendan. Selepas mendengar hujah daripada pihak-pihak dalam permohonan A 14A, hakim bicara memutuskan bahawa hanya terdapat satu isu untuk dibicarakan melalui satu perbicaraan penuh dan isu tersebut adalah isu had masa. Kedua-dua pihak juga bersetuju bahawa perbicaraan perlu diteruskan untuk tujuan terhad tersebut.

Diputuskan, menolak tuntutan dengan kos:

(1) Seksyen 6(1) Akta memperuntukkan bahawa kesemua kausa tindakan berasaskan kontrak atau tort atau untuk mendapatkan apa-apa jumlah wang di bawah undang-undang pemulangan tidak boleh dibuat selepas habis tempoh enam tahun dari tarikh terakrunya kausa tindakan. Tanpa mengambil kira s 6(1) Akta, s 29 Akta membenarkan penangguhan tempoh had masa sehingga penzahiran kausa tindakan dalam kes-kes di mana kausa tindakan berasaskan penipuan atau kesilapan atau tersembunyi oleh penipuan. Walau bagaimanapun, oleh kerana kes yang diplidkan oleh plaintif-plaintif adalah untuk mendapatkan balik 1/3 bahagian daripada wang dalam akaun bank, mereka sepatutnya memfailkan kes mereka dalam tempoh enam tahun dari tarikh terakrunya kausa tindakan, menurut s 6(1) dan (6) Akta tersebut. Oleh kerana plaintif telah tidak memplidkan bahawa kes mereka berasaskan

penipuan, kesilapan atau penyembunyian penipuan, mereka tidak boleh bersandar kepada peruntukan s 29 Akta untuk menunjukkan kepada mahkamah bahawa hak tindakan mereka telah disembunyikan oleh penipuan defendan. Adalah undang-undang tetap bahawa plaintif terikat dengan pliding mereka dan tidak sepatutnya dibenarkan untuk mengemukakan perkara-perkara yang tidak diperuntukkan dengan nyata dalam pliding mereka (lihat perenggan 22& 25).

(2) Berdasarkan keterangan yang dikemukakan semasa perbicaraan, tidak dipertikaikan bahawa maklumat berkaitan dengan wang dalam akaun bank diketahui oleh plaintif pertama sejak tahun 1970. Ia juga jelas bahawa jika plaintif telah lebih tekun dan berhati-hati, mereka boleh dengan usaha yang munasabah, mendapat tahu mengenai pengeluaran tersebut lebih cepat dan dengan itu mengambil langkah-langkah yang perlu untuk memulakan tindakan mendapatkan semula 1/3 bahagian daripada wang yang disimpan dalam akaun bank terlebih dahulu. Plaintif-plaintif telah gagal dalam tugas asas dan pertama mereka ke atas harta pusaka si mati. Dengan lebih tekun, mereka mempunyai peluang untuk memulakan tindakan seawal mungkin, tetapi mereka memilih untuk menangguhkan perkara tersebut sehinggalah had masa yang ditetapkan (lihat perenggan 23).

(3) Akhirnya, hujahan amanah konstruktif dinafikan oleh keputusan kes Mahkamah Rayuan yang mengikat dan dipersetujui, plaintif tidak mempunyai pembelaan untuk memenuhi rayuan had masa yang dibangkitkan terhadap mereka oleh defendan. Oleh itu, tuntutan plaintif terhalang oleh Akta (lihat para 28–29).]

Notes

For a case on accural of cause of action, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 2176.

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750; [1997] 2 CLJ 79, CA (refd)

Ambank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663, CA (refd)

Esso Petroleum Co Ltd v Southport Corp [1956] 2 WLR 81, HL (refd)

Koh Siew Keng (P) & Anor v Koh Heng Jin [2008] 3 MLJ 822; [2008] 3 CLJ 450, CA (refd)

Menah Sulong v Lim Soo & Anor [1983] 3 CLJ 26, FC (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (refd)

Legislation referred to

Limitation Act 1953 ss 6, 6(1), (6), 22, 29, 32
Rules of the High Court 1980 O 14A
Subordinate Courts Act 1948 s 69(e)
Trustee Act 1949

(Zainur Zakaria & Co) for the plaintiff.
(Abd Halim Ushah & Associates) for the defendant.

Asmabi Mohamad JC:

INTRODUCTION

[1] The plaintiffs who are the administrators of the estate of Koh Hing @ Koh Heng Teik ('the deceased') had commenced this action against the defendant to recover 1/3 of the monies held in a joint account with Bangkok Bank Ltd in Singapore ('the bank') that the defendant had withdrawn. The plaintiffs' claim was premised on an agreement entered into between the deceased's late father one Koh Hooi Chiew ('KHC'), the defendant and the deceased that each of the co-holder of the account shall be entitled to a 1/3 share of the sum of the fixed deposit in the joint account in the said bank. The plaintiffs alleged that upon the demise of the deceased the 1/3 share of the sum of S$346,505.09 (S$115,501.70 per share) held in the said account or its equivalent in the Malaysian currency shall form and be part of the estate of the deceased.

[2] The plaintiffs had filed an application pursuant to O 14A Rules of the High Court 1980 ('encl 114') to enter judgment against the defendant. The plaintiffs had relied entirely on the decision of the Court of Appeal vide Civil Appeal No W-04–81 of 2005 which was reported in *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450 ('the Court of Appeal case') to support their application under O 14A of the Rules of the High Court 1980. According to the plaintiffs the cause of action in that case was similar to the case before me except that the plaintiffs cited in that case were acting in their capacity as the administrators of the estate of the late mother of DW1 and the deceased. According to the plaintiffs there was already a decision by that court which had conclusively determined the very question of law posed herein based on the facts which were similar.

[3] Enclosure 114 was fixed for hearing on 26 January 2012. After hearing the lengthy submissions by both learned counsel, I found that there was only one issue left to be ventilated by way of a full hearing, which was, the issue of limitation. I then fixed this case for hearing on 20 March 2012 for this court to determine if the plaintiffs' claim was barred by limitation. At the outset of the trial both learned counsel had informed me that the parties herein had agreed

to be bound by the finding of fact and law in the Court of Appeal case, except on the issue of limitation as the facts with regard to this issue in that case were slightly different.

[4] After hearing the evidence of the first plaintiff ('PW1') and the defendant ('DW1') and upon hearing the submissions by the respective learned counsel I found that the plaintiffs' claim was barred by limitation. Hence I dismissed the plaintiffs' case with costs.

[5] The plaintiffs being dissatisfied with the said decision appealed to the Court of Appeal against the whole of the said decision.

THE DOCUMENTS

[6] At the outset of the trial parties have agreed for the following documents to be used:

Description	Document
(a) Bundle of pleadings	'A'
(b) Common agreed document 'A'	'B'
(c) Disputed bundle of document 'B'	'C'
(d) Issues to be tried	'D'
(e) Statements of agreed facts	'E'

THE ISSUES TO BE TRIED

[7] Initially both parties to the suit had raised six issues for this court's consideration as shown in document 'D'. After the hearing of encl 114 both parties had agreed that the only outstanding issue for this court's determination was issue No 6 in document 'D'.

THE BRIEF FACTS OF THE COURT OF APPEAL CASE

[8] For ease of reference and for better grasp of the facts of the Court of Appeal case I would restate the brief facts of the Court of Appeal case herein. The facts of the case and the law pertaining to the Court of Appeal case had been well illustrated by learned counsel for the plaintiff in learned counsel's written submission I could do no better then to summarise the facts and the law as set out by learned counsel for the plaintiff as follows:

(a) in September 1970 one Koh Hooi Chiew the late father of DW1 and the deceased ('KHC') had opened an account with the bank in the name of himself, the defendant and the deceased. Some monies were deposited

into the account. Shortly after the account was opened KHC died. He left a will and named his widow the mother of DW1 and the deceased and the defendant respectively as the executor/executrix of his estate. The will made several bequests and left the residue to his widow. A couple of months after KHC died the deceased died. Upon the death of the deceased the defendant then became the only surviving holder of the account;

(b) the defendant did not do anything to the monies in the account. However some ten years later he withdrew all the monies in the account amounting to S$346,505.09, closed the said account and kept the monies all to himself;

(c) the appellants then commenced an action in the sessions court against the defendant to claim the 1/3 share of the monies belonging to KHC. The appellants' claim was premised on the ground that there was in fact an agreement between the co-holders of the account that KHC would be entitled to 1/3 share of the said monies which formed part of the residue of the estate of KHC. The appellants contended that as a residuary beneficiary the widow of KHC was entitled to the said monies; and

(d) in his defence the defendant relied on s 69(e) of the Subordinate Courts Act 1948 ('SCA'). As the appellants had pleaded that the defendant was a constructive or implied trustee the session court was not vested with the jurisdiction to adjudicate the matter. Further the defendant contended that there was already an agreement between the co-holders of the account that the surviving holder was entitled to all the monies in the account should the other two co-holders predecease him. The defendant had also pleaded that the appellants' claim was barred by the Limitation Act 1953 ('Act') as it was filed after the six years period provided by the Act.

JUDGMENT OF THE COURT OF APPEAL

[9] It is also pertinent at this juncture to examine the decision of the Court of Appeal to ascertain the issues that had been canvassed and resolved by the Court of Appeal in order to guide this court in determining the case at hand. Briefly His Lordship Justice Gopal Sri Ram (JCA) in delivering the judgment of the court stated the following:

(a) the words 'enforce trust' in s 69(e) of the SCA refers to an action filed by the beneficiary or beneficiaries to compel the trustee of a trust to perform the terms of the trust or settlement or to direct the trustee to refrain from doing anything inconsistent with the trust;

(b) the High Courts are vested with the supervisory power to oversee proper

A administration of trusts to ensure that all dealings pertaining to the trust property are properly dealt with by the trustee;

(c) based on the facts placed before it the Court of Appeal found that the defendant was not the trustee of the monies standing in the account but he was merely a person who was accountable in equity to the widow of KHC for the monies belonging to the her late husband. That being the case the session court was therefore vested with the jurisdiction to adjudicate the matter;

(d) the Court of Appeal had made a distinction between a constructive trustee and a person who was under a duty imposed by equity to account to the true owner of the monies or property that he had unlawfully acquired or had dishonestly assisted another to unlawfully acquire. According to the Court of Appeal the defendant was neither a fiduciary nor a trustee in the true sense. He was merely a person who was liable in equity to account for the said monies to the appellants;

(e) the Court of Appeal observed that the defendant in that case was an executor of the estate of KHC. That being the case, the defendant was to be regarded as a trustee within the broader definition of the Trustee Act 1949. As such the Court of Appeal ruled that ss 22 and 29 of the Act could be invoked by the plaintiffs to defeat the defence of limitation mounted by the defendant;

(f) further the Court of Appeal had held that there were evidence to support the appellant's claim that there was in fact an agreement between KHC, the defendant and the deceased that each account holder should be entitled to 1/3 share of the monies in the account. The first crucial evidence was the document for the purpose of the opening of the account with the bank which had clearly stated that the monies could only be withdrawn with all the three co-holders' signatures. Secondly in the documents pertaining to the probate obtained in Malaysia which was presented to the Singapore High Court for resealing, DW1 had deposed in the memorandum of resealing that 1/3 share of the fixed deposit held in the bank in Singapore formed part of the assets of KHC. The Court of Appeal had ruled that by instructing his solicitors to state the facts pertaining to the 1/3 share as belonging to KHC there was an unqualified admission by DW1 that the 1/3 share of the monies in the sum of S$191,100 plus interest belonged to KHC. This supported the appellant's claim to the 1/3 share of the monies in the bank;

(g) the Court of Appeal went further to look at the conduct of the defendant after the demise of KHC and ruled that this fact ought to be taken into consideration in deciding the issues posed before it. From the facts the defendant did not touch the account until about ten years later when he decided to withdraw the monies and kept the monies to himself. The

defendant had deliberately waited this long because he knew that the 2/3 monies in the account did not belong to him; and

(h) the Court of Appeal ruled that based on the above facts if taken together the only reasonable and probable conclusion that might be arrived at was that KHC was entitled to 1/3 of the share of the monies in the account. As such the appropriation of all the monies by the defendant with the knowledge that the said monies belonged to KHC amounted to an unconscionable conduct or as the said court had termed it as 'at the very list to equitable fraud'.

[10] In the Court of Appeal case the plaintiffs were the administrators of the estate of the widow of the KHC who was the late mother of the defendant and the deceased claiming the 1/3 share of the monies in the bank which formed the residue of the estate of KHC. Whilst the plaintiffs in the case before me were the administrixes of the estate of Koh Hing @ Koh Heng Teik ('the deceased') claiming the other 1/3 share of the monies held in the bank belonging to the estate of the deceased. The first plaintiff was the deceased's wife. The defendant cited in both these cases was the same person in the name of Koh Heng Jin. The defendant and the deceased were siblings and KHC was their late father.

CASE FOR THE PLAINTIFFS

[11] The first plaintiff, Phuah Beng Chooi, ('PW1') was the wife of the late Koh Hing @ Koh Heng Teik ('the deceased') and the second plaintiff was the sister of the first plaintiff. Both the plaintiffs are the administrixes of the estate of the deceased. The defendant ('DW1') is the elder brother of the deceased. According to PW1 the deceased died on 11 May 1971. PW1 did not appoint any lawyer to assist her with the application for the letters of administration of her husband's estate as the defendant had offered to help her with the filing of the application. As PW1 was an illiterate PW1 had left everything to DW1 who was managing the family business and also in charge of the family properties to assist her in the filing of the application. DW1 had arranged for PW1 and the second plaintiff to see a Commissioner for Oath to execute some documents for the said purpose. This had led to the grant of letters of administration by the Kuala Lumpur High Court on 3 December 1977 (p 4 of document 'C').

[12] PW1 informed the court that she had some information about the monies being deposited by the KHC in Bangkok Bank Ltd Singapore sometime in 1970. After the death of the deceased DW1 had approached PW1 and informed PW1 that he was willing to attend to the withdrawal of the monies from the account. DW1 promised to appoint the legal firm of Messrs ASK Wee in Singapore to attend to the documentation and the resealing of the

letters of administration in Singapore. Around 1980 or 1981 DW1 had brought back with him some documents to be executed by PW1 and the second plaintiff for purposes of resealing of the grant of the letters of administration in Singapore to enable the monies to be withdrawn.

[13] PW1 waited for some feedback from DW1 regarding the status of the 1/3 share of the monies which belonged to her late husband. Neither the feedback nor the 1/3 share of the monies was forthcoming. Each time PW1 inquired about the monies DW1 would tell her to wait and this had been going on for some years. As PW1 was fed up with DW1 for giving her the same old excuses for several years, around 1990 PW1 decided to go to Singapore with her son to check on the status of the monies in the account. Whilst in Singapore PW1 engaged the firm of Messrs JS Yeh to assist her in ascertaining the status of the account with the bank. Messrs JS Yeh then had caused a letter to be sent to the bank to enquire about the status of the account. Soon after that the said Messrs JS Yeh had received a reply from the bank stating that the said monies had been withdrawn in 1982 and the account had been closed. (Question 23–28 of WSPW1)

[14] It was at this point that PW1 realised that DW1 had withdrawn all the monies in 1982 and kept the monies all to himself. After having realised that the 1/3 share belonging to the deceased had been fully withdrawn and kept by DW1, PW1 then commenced this action on 29 May 1995 in the sessions court to claim for the return of S$115,501.70 which was 1/3 share belonging to the deceased in the joint account held by KHC, DW1 and the deceased. The plaintiffs had also claimed for interest and costs. Besides that the PW1 also claimed for RM10,000 for the defendant but during the hearing the court was informed that the plaintiff no longer wished to proceed with this claim.

CASE FOR THE DEFENCE

[15] Koh Heng Jin @ Koh Heng Leong ('DW1') testified that the fixed deposit account in the Bangkok Bank Ltd Singapore was opened by his late father KHC in September 1970 in order to make provision for the benefit of the deceased and DW1 respectively in the event something untoward happened to KHC.

[16] DW1 had accompanied KHC to Singapore for the purpose of opening of the account. The said account was opened under three names, KHC, the deceased and DW1 respectively. According to DW1 the monies in the account could only be withdrawn if jointly signed by all the three co-holders. In the event of the death of any one of the three co-holders of the account the surviving named co-holder/holders might withdraw the monies.

[17] On 24 September 1970 which was about ten days after the account was opened KHC died. On 11 May 1971 the deceased died. As DW1 had no immediate use for the said monies DW1 did not withdraw any monies in the account. Around 1980 DW1 was notified by the bank that the monies standing in the said account might be withdrawn by DW1 as DW1 was the sole survivor of the account. After being notified of this, DW1 then told his late mother and PW1 that he was going to Singapore to withdraw the monies. Around 1981 DW1 withdrew the monies from the account and on DW1's return he informed his late mother and PW1 that the monies in the account had been withdrawn and the account had been closed.

[18] Despite being told of the withdrawal as well as the closing of the account both DW1's late mother and PW1 did not state any objection as to DW1's right to the monies. DW1 was shocked that PW1 and his late mother had launched suits against him. Further the defendant alleged that the plaintiffs' action having been filed on 29 May 1995 was therefore filed out of time hence barred by the Act. Therefore the defendant urged this court to dismiss the plaintiff's claim with costs.

THE FINDINGS OF THE COURT

[19] Having perused the judgment of His Lordship Justice Gopal Sri Ram in the Court of Appeal case it was clear that in that case the appellants were claiming the 1/3 share of the monies which were deposited in the bank belonging to the estate of KHC. Whilst the plaintiffs in the suit before me who were the administrixes representing the estate of Koh Heng Teik (the deceased brother of DW1) were claiming the other 1/3 share of the monies in the bank belonging to Koh Heng Teik one of the co-holders of the account in the bank and the deceased brother of DW1. It is important to note that the Court of Appeal had unequivocally ruled that the monies standing in the said account in the bank belonged to three persons, KHC, DW1 and DW1's deceased brother respectively. The reasons as to why the Court of Appeal arrived at that decision had been illustrated in the earlier part of this judgment.

[20] After hearing both learned counsel's submissions and in light of the findings of facts and law by the Court of Appeal as illustrated above I was of the view that the only outstanding issue between the plaintiffs and the defendant was whether the plaintiffs' action herein was barred by the provision s 6(1) of the Act and or whether the plaintiffs could rely on s 29 of the same Act to defeat the defendant's defence. In view of that I had ordered that the trial be proceeded with to determine the issue of limitation and nothing more. Both learned counsel had also agreed with me that the trial should proceed only for that limited purpose.

[21] It could be gleaned from the plaintiffs' pleadings that their case against the defendant was a straight forward case for recovery of the 1/3 share of the monies in the account. At para 7 of their SOC the plaintiffs pleaded that vide their solicitors JS Yeh & Co the plaintiffs had come to know that the said account had been updated around 1981 and on or around 2 January 1982 the said monies has been withdrawn by the defendant and kept to himself. In doing so the defendant had not taken into consideration the interest of the estate of his deceased brother which was entitled to receive 1/3 of the S$346,505.09 which the plaintiffs were claiming via this suit.

[22] Section 6(1) of the Act provides that for all cause of action founded on contract or tort, action for enforcement of recognisance or award, actions to recover any sum pursuant to a return law other than a penalty, forfeiture, or a sum by way of forfeiture and penalty shall not be brought after the expiration of six years from the date of the accrual of the cause of action. By analogy s 6(6) of the Act provides that subject to ss 22 and 32 of the Act all claims for specific performance of a contract, injunction or for other equitable relief whether the same was founded on contract or tort or upon trust or for other ground in equity shall be commenced within six years from the date of the accrual of the cause of action. Notwithstanding s 6(1) and (6) of the Act, the Act had also made provision for the postponement of the limitation period for commencement of an action against a defendant. Section 29 of the Act allows for postponement of the limitation period until the discovery of the cause of action in cases where the cause of action was premised upon fraud or a mistake or is concealed by fraud.

[23] A perusal of the plaintiffs' SOC would show that the plaintiffs had come to understand that the monies were withdrawn by the defendants in 1990. There was no evidence before me to show if attempts were made by the plaintiffs to inquire about the monies standing in the account much earlier despite having the full opportunity to do so had the plaintiffs been diligent. Neither had the plaintiffs pleaded that they had made all reasonable attempts to inquire about the status of the monies from the bank. The evidence which was disclosed during the trial was that the first plaintiff knew about the monies in the said bank from the time the monies were deposited in 1970. From exh P1 tendered in court (at pp 4–5 of document 'C') the first plaintiff knew about the monies as early as 1973 and 3 December 1977 respectively. This fact was further fortified by the fact that pursuant to the amended petition for purposes of resealing of the grant of the letters of administration in Singapore the first plaintiff had already had the information about the 1/3 of her husband's share at least on 7 January 1980. The plaintiff had in fact deposed an affidavit for the purposes of resealing of the letters of administration in Singapore and at para 5.6 of the amended petition for resealing purposes both the plaintiffs had stated that the deceased had property in Singapore. The affidavit of PW1 was

deposed on 7 January 1980 (at pp 12–14 of document 'C'). From the evidence adduced during the trial it was not disputed that the information pertaining to the monies were well within the first plaintiff's knowledge way back in 1970 (PW1's evidence that she heard about the monies from her parents-in-law), 1977 (the plaintiffs obtained letters of administration of the estate of the deceased from the High Court of Malaya (exh P1 at pp 4–7 of document 'C')), December 1979 (Petition for Probate No 1282 of 1979 (at pp 8–10 of document 'C')) and 7 January 1980 (affidavit for purposes of amended petition for resealing of letters of administration in Singapore (at pp 12–14 of document 'C')) respectively. PW1 had also stated in evidence that she had made several requests to the defendant pertaining to the said monies but had repeatedly been told to wait and wait. Based on the above facts which were adduced during the trial I am satisfied that if the plaintiffs been more diligent and vigilant they could with reasonable diligence discover about the withdrawal. Hence the plaintiff could have discovered what happened to the monies and could have taken the necessary steps to commence the action against the defendant to recover the 1/3 share of the monies held in the bank much sooner. The plaintiffs as the administrixes of the estate of the deceased too had made no attempts to write to the bank either through their solicitors or themselves to check the status of the monies in the bank despite having known about the monies as early as 1970, 1977, 1979, 1980 respectively. As the administrixes of the estate this was one the plaintiffs' basic and first duty to the estate of the deceased which the plaintiffs failed to perform.

[24] The plaintiffs had pleaded in their SOC that the DW1 had withdrawn the money in the joint account which belonged to the deceased on 2 January 1982. The plaintiffs' claim against the defendant was for recovery of the 1/3 share of the monies in the bank. Hence by virtue of ss 6(1) and (6) of the Act the plaintiffs ought to have filed their case within six year from the date of the accrual of the cause of action. With the above facts I am satisfied that the plaintiffs had every the opportunity to commence the case at the earliest possible opportunity if they had been diligent. Instead the plaintiff chose to delay the matter until limitation had set in.

[25] Learned counsel attempted to rely on s 29 of the Act to show that there was in fact a postponement of the limitation period until the discovery of the cause of action. Unfortunately upon perusal of the SOC I found that, that was not the plaintiffs' pleaded case. The plaintiffs had not pleaded that their case was premised on fraud, a mistake or concealment of fraud. Theirs was a simple claim for recovery of the monies. In order for the plaintiffs to rely on s 29 of the Act the facts justifying the same ought to have been pleaded in the SOC. Failing which the plaintiffs could not rely on the provision of s 29 of the Act to demonstrate to the court that their right of action had been concealed by fraud of DW1.

[26] In *Ambank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663 His Lordship Justice Abd Malik Ishak (JCA) held that s 29 could be resorted to in cases where the cause of action is premised upon fraud or a mistake or is concealed by fraud. According to His Lordship Justice Abd Malik for a plaintiff to succeed under s 29 of the Act the plaintiff must plead one of these elements of fraud or a mistake or concealment by fraud in the pleadings. The plaintiffs in the case at hand had not pleaded that their case was premised under one of instances mentioned earlier. Therefore the plaintiff could not rely on s 29 of the Act for purposes of postponement of the limitation period as had been submitted by the learned counsel for the plaintiffs. Further the proviso to s 29 of the Act provides that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be or could with reasonable diligence have discovered.

[27] Learned counsel for the plaintiffs had attempted to submit that the defendant had concealed the fraud in this case with regard to the withdrawal of the monies in the account. Hence the plaintiffs could rely on the provision of ss 22 and 29 of the Act to defeat the defence of limitation raised by the defendant. Section 29 of the Act only allows for postponement of limitation until discovery of the cause of action in cases founded on fraud or a mistake or concealed by fraud. Despite having submitted that s 29 of the Act could be relied by the plaintiff, the plaintiffs however had not raised this issue in their SOC. There was no facts pleaded pertaining to the alleged fraud and or what is the fraud concealed and or what fraud had been applied by the defendant to conceal it. It is trite law that the plaintiffs are bound by the four corners of their pleadings and ought not to be allowed to submit on matters not expressly provided in their pleadings. As the law on this area is so clear. I would not delve on the basic principles of pleadings as these had been well illustrated in a number of authorities, among others; *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 (FC); *Menah Sulong v Lim Soo & Anor* [1983] 3 CLJ 26; *Esso Petroleum Co Ltd v Southport Corp* [1956] 2 WLR 81; *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79.

[28] Finally with the constructive trust contention being negated by the agreed binding decision of the Court of Appeal case the plaintiffs are left with no defence to meet the plea of limitation mounted against them by the

plaintiffs.

CONCLUSION

[29] Based on the foregoing I am satisfied that the plaintiffs' claim ought to be dismissed with costs as it was barred by the Limitation Act 1953.

Claim dismissed with costs.

Reported by Kohila Nesan